No. 78-1924

In the Supreme Court of the United States

OCTOBER TERM, 1978

SUSAN D. GOLAND, ET AL., PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that a congressional transcript loaned to the Central Intelligence Agency is not an "agency record" under the Freedom of Information Act, 5 U.S.C. 552, and in affirming the district court's grant of summary judgment.

In 1975, petitioners filed a Freedom of Information Act request with the Central Intelligence Agency, seeking "access to 'all records concerning the legislative history' of the National Security Act of 1947, the CIA Act of 1949, and two bills introduced into Congress in 1948 providing for the administration of the Agency" (Pet. App. 2a). The CIA initially turned over copies of five documents, but it declined to release a 1947 transcript of hearings held before the House Committee on Expenditures in the

Executive Department (Pet. App. 3a). The CIA explained that the hearing transcript had been stamped "secret" by Congress and that it was a "legislative document under the control of the House of Representatives" to which the FOIA does not apply (*id.* at 3a-4a).

Later, two additional documents were found. Pursuant to Exemptions 1 and 3 of the FOIA, 5 U.S.C. 552 (b)(1), (3), the CIA deleted portions of one of these documents, a statement delivered in 1948 to a House committee by Director of Central Intelligence Hillenkoetter. The CIA released the other document (also a congressional statement) in full (Pet. App. 5a). Subsequently, just after the court of appeals issued its initial opinion in this case, the CIA released to petitioners hundreds of additional, newly discovered, documents (*id.* at 58a-61a).

Both the district court and the court of appeals upheld the CIA's withholding of the hearing transcript and the deleted portions of the Hillenkoetter statement. The lower courts also ruled that the CIA's search for the other documents in response to petitioners' FOIA request had been sufficient. Petitioners now contend that the hearing transcript may not be withheld because it is a CIA record, not a congressional document, and that the courts below erred in deciding the case on summary judgment. These claims do not warrant the Court's review.

1. Congress and the federal courts are expressly excluded from the FOIA's reach. 5 U.S.C. 551(1)(A), (B) and 552(e). In the present case, the court of appeals followed the established case law that an agency's mere possession of documents created and controlled by Congress or the courts does not require the agency to make such documents available for public inspection under the Act (see Pet. App. 7a-14a). Accord, *Warth* v.

Department of Justice, 595 F. 2d 521 (9th Cir. 1979); *Cook* v. *Willingham*, 400 F. 2d 885 (10th Cir. 1968). Here, it is undisputed that the transcript was generated in an executive committee session, it was stamped "secret," and Congress has never indicated an intent to make the document public (Pet. App. 12a). Congress has the prerogative, rooted in the Constitution (U.S. Const. art. I, 5) and internal rule (House of Representatives Rule XI(2)(k)(7)), to maintain the secrecy of its documents in appropriate circumstances. Congress is surely entitled to release its documents to an agency of the government subject to retention of control over access by the public. The CIA therefore lacked sufficient control of the transcript to release it under the FOIA. There is no conflict among the circuits on this issue.

Petitioners urge this Court to grant review in this case because of two pending cases involving the scope of the "agency records" coverage of the FOIA, *Forsham* v. *Harris*, No. 78-1118, and *Kissinger* v. *Reporters Committee for Freedom of the Press*, Nos. 78-1088 and 78-1217. But, as petitioners appear to recognize (Pet. 16), *Forsham* and *Kissinger* principally involve an "agency records" issue quite different from the problem in the present case—the FOIA's coverage of records not in an agency's possession, but which the agency once had (*Kissinger*) or never had (*Forsham*). Here, by contrast, the issue is much narrower and much more fact bound—whether a particular hearing transcript, due to the circumstances of its creation and history, falls within the Act's express exemption of congressional records, 5 U.S.C. 551(1)(A). Hence, the general scope of the term "agency records," at issue in *Kissinger* and *Forsham*, is not implicated here.

2. Petitioners also challenge (Pet. 17-20) the use of summary judgment in this case. The court of appeals held

that the CIA's affidavits were sufficient to justify the adequacy of the agency's search for documents (Pet. App. 23a-31a, 63a-64a) and its deletion of portions of the Hillenkoetter statement pursuant to 50 U.S.C. 403(d)(3) and 403g (Pet. App. 15a-23a).[1] Petitioners find it "disturbing" that summary judgment has been permitted in a number of "national security"-type cases (Pet. 18).

As the courts of appeals have repeatedly recognized, however, summary judgment is appropriate in FOIA cases involving national security claims, without *in camera* document review or trial, whenever agency affidavits are sufficient to justify the agency's non-disclosure. See, *e.g.*, *Ray* v. *Turner*, 587 F. 2d 1187, 1194 (D.C. Cir. 1978); *Cox* v. *Department of Justice*, 576 F. 2d 1302, 1311-1312 (8th Cir. 1978); *National Commission on Law Enforcement* v. *CIA*, 576 F. 2d 1373, 1377 (9th Cir. 1978); *Maroscia* v. *Levi*, 569 F. 2d 1000, 1003 (7th Cir. 1977); *Bell* v. *United States*, 563 F. 2d 484, 487 (1st Cir. 1977). Here, the district court and the court of appeals ruled, on the basis of detailed affidavits presented by the CIA, that summary judgment was proper. This essentially fact-bound determination poses no unsettled question of law or policy.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[1]These statutes fall within Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3) (Pet. App. 16a-20a).

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